Company v. Hawkesford[1] in the following passage:—

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it . . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The present cases falls within the latter class.

The rule cited in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd.*[2] and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Company.*[3]

What "right" does the Election Offences Act, 1954 confer, using the word "right" in its broad sense? In my judgment, the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v. Laudry,*[4] *Goonesinha v. Hon. C.I. de Kretser*[5] or what is said in *Arzu v. Arthur*[6] as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v. Returning Officer, Nammakkal Constituency & Ors.*).[7]

The statutory requirements of election law are mandatory and must be strictly observed: see *Devan Nair v. Yong Kuan Teik,*[8] *Harcharan Singh v. Mohinder Singh*[9] and *Chong Thain Vun v. Watson & Anor.*[10]

It is now necessary to put a construction upon the provisions of section 38(1) of the Election Offences Act, 1954 and regulation 10 of the Elections (Conduct of Elections) Regulations, 1959. Regulation 10 enacts that after determination by the returning officer of any objections which may have been lodged, only one candidate stands nominated, he shall forthwith declare him to be elected and shall forthwith make a return in the prescribed form to the Supervisor of Elections, who in turn shall cause the same to be gazetted. It cannot be said that the return of the successful candidate is made as soon as the returning officer declares him to be elected or signs the prescribed form. It seems to me that the true meaning of the regulation is that the return is made when the returning officer sends the prescribed form to the Supervisor of Elections who on receipt of it acts upon it in the sense required by the regulation. Now, what has the Supervisor of Elections to do upon a return being made to him? He has to gazette the name. In this sense a return is only complete when it reaches the hands of the Supervisor of Elections, so that he can act upon it as is required by law. Now, section 38(1) uses peremptory language and provides a remedy which must be taken to mean what it says, that no court of law is to recognise a petitioner having a right of law until after the date of publication of the election result in the *Gazette*. The word "of" in this context is no different from the word "after".

For these reasons the petitioners, under the compulsion of the Act, must present their petitions twenty-one days 'after' the date of publication of the election result in the *Gazette*. Petition Nos. 1, 2 & 3 of 1969 are dismissed with separate costs to the first respondents on the higher scale. Moneys deposited by way of security may be applied towards payment of taxed costs.

Order accordingly.

Petitions dismissed.

Solicitors: *Abdul Aziz Abdullah & Co.; Rithauddeen & Aziz.*

LEE AH LOW v. CHEONG LEP KEEN & ANOR.

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian and Ali F.JJ.) July 26, 1969]

[Kuala Lumpur—Federal Court Civil Appeal No. X.64 of 1968]

Landlord and Tenant — Lease for 80 years not registered — Effect of tenant entering into possession — Payment of monthly rent — Notice to quit.

In this case certain premises in Malacca had been let by one Toh Kim Soon to the appellant for a term of 80 years on a monthly rent of $100. The agreement was not by deed nor was it registered. The appellant went into occupation and paid the monthly rent. Subsequently the land was sold to the respondents, who then gave a notice to quit to the appellant terminating "his monthly tenancy on April 30, 1969 or at the end of the period of the tenancy expiring next." The learned trial judge held that the appellant held the land under a tenancy and that this tenancy had been effectively put an end to by the notice to quit. On appeal,

Held (Ong Hock Thye C.J. dissenting): (1) the written instrument in this case was void as a lease;

(2) the learned trial judge was correct in holding that on the proper construction of the tenancy agreement

the tenancy was a monthly tenancy and that this had been terminated by a valid notiie to quit.

[Editorial Note: This appeal was in reality an appeal against the judgment in *Cheong Lep Keen & Anor.* v. *Tan Tin Kek* [1968] 2 M.L.J. 126. In the court below it was agreed by both parties in this appeal that that decision would be accepted as a decision in this case].

Cases referred to:—

(1) *Adler* v. *Blackman* [1953] 1 Q.B. 146.

(2) *Doe d. Rigge* v. *Bell* (1793) 5 T.R. 471; 101 E.R. 265.

(3) *Braythwayte* v. *Hitchcock* (1842) 10 M. & W. 493, 497; 152 E.R. 565, 567.

(4) *Ladies Hosiery and Underwear Ltd.* v. *Parker* [1930] 1 Ch. 304.

(5) *Tress* v. *Savage* (1853) 4 E.L. & B.L. 36; 119 E.R. 15.

FEDERAL COURT.

M. Abraham for the appellant.

N.A. Majoribanks for the respondents.

Ong Hock Thye C.J. (Malaya): This is an appeal by the tenant of premises No. 33A Newcome Road, Malacca against the decision of the High Court in Malacca, ordering him to give up vacant possession to the landlords, respondents herein.

The sole question to be determined is whether, in the crcumstances of this case, the premises were held under a monthly tenancy or from year to year.

There is no controversy regarding the facts and findings of fact of the trial judge. In 1958 these premises were let by one Toh Kim Soon to the appellant, under an agreement in writing, for a term of 80 years at "a monthly rent of $100." Under the agreement the appellant was "entitled to make use of the house rented to him for carrying on any type of business for eighty years" and pursuant thereto he set up therein a beauty parlour. In 1964 the respondents became landlords, in succesSon to Toh, by purchase of the premises and on March 1, 1966 they gave notice to the appellant terminating his "monthly tenancy . . . . . on the 30th day of April 1966 or at the end of the period of the tenancy expiring next". Upon expiry of the month's notice the respondents commenced action on May 9, 1966 in the High Court and an order for possession was made in their favour on January 6, 1969.

The grounds of decision of the learned trial judge have been neatly summarised in his own words thus:—

"It is clear from the authorities which I have discussed that in the present case the agreement under which the defendant went into occupation of the premises at No. 33A, Newcome Road, Malacca was void as a lease by reason of the provisions of section 5 of the Registration of Deeds Ordinance (S.S. Cap. 121). The result of his entry upon that void lease was the same as would flow from an entry upon an agreement for a lease. Upon his entry the legal relationship of landlord and tenant arose and he became a tenant at will. When he paid the monthly rent reserved under the so-called lease the tenancy at will changed into a tenancy from month to month upon the terms of the intended lease. It was subject to this monthly tenancy that the premises must be deemed to have been sold to the plaintiffs, so that the defendant became a monthly tenant of the plaintiffs. This monthly tenancy was determined by the plaintiffs by the notice to quit. In my judgment that was a valid notice to quit . . . . ."

The case for the appellant was that the true intention of Toh, the original landlord, was to grant his tenant a tenancy for life. Since, in law, no such tenancy could follow from a lease which was invalid, it was argued that the effect of appellant's entering into occupation upon the terms of the agreement was to give rise to a tenancy from year to year. The substantive ground of this appeal, therefore, is that the judge had misdirected himself by giving too much weight to the mode of payment of rent in deciding whether a yearly tenancy had been created, without taking into consideration other material factors such as the conduct and intention of the parties to the agreement, the terms of the lease expressed to be granted and the nature of the business carried on in the premises.

For present purposes I do not think it will be necessary to enter upon any discussion of case law, apart from referring to certain general observations of their Lordships in *Adler v. Blackman.*[1] In the first place, the presumption as to the nature of the tenancy on holding over is a rebuttable presumption (*per* Somervell L.J. at page 148). In the second place "what one is seeking here is the intention to be imputed to the parties from the facts that the tenant has remained in occupation with the consent of the landlord and has paid rent, ... In my view, ... other evidence may be resorted to for the purpose of ascertaining what their true intention was" (*per* Jenkins L.J. at page 152). Adopting these observations for my *ratio decidendi* and having perused the judgement with the greatest care I have regretfully come to the conclusion that undue emphasis had been placed on payment of monthly rent alone, while ignoring altogether the fact that the mode of payment was only one among other material facts which have to be taken into account in seeking to ascertain the true intention of the parties. In my view there is no magic in the mode of rent payments which renders it a piece of crucial evidence outweighing everything else in the ascertaining of intention.

That intention in the instant case was too clear for dispute. It was expressed in writing and affirmed by Toh as a witness. He had felt

himself bound to leave the tenant in peace. As he put it: "If I had been able to sell the premises with vacant possession I would not have sold them for $26,000". This plainly cannot be reconciled with a presumed intention on his part to grant only a monthly tenancy. Once this is accepted, I think there can be no question that, if the only possible tenancy that can arise by reason of the invalidity of the lease has to be either a tenancy from year to year or a monthly tenancy, it must be presumed that the parties' intention was to give the tenant better security of tenure than could be afforded by a tenancy terminable by a month's notice.

In support of this view was the appellant's user of the premises for business rather than residential purposes. In the latter case no question of building up a goodwill, for instance, has any place, nor the situation of the premises etc. Indeed the contemplated user of the premises for business purposes was expressly stated in the written agreement.

Furthermore, all the authorities considered by the learned judge were cases of "holding over" after the expiry of an agreed term, without any express agreement. There the intention to be imputed to the parties had to be gathered from relevant circumstances. In most cases the mode of payment of rent was the only fact from which an inference had to be drawn of the intention to be presumed, in default of any agreement. In the instant case, however, there was no such blank requiring to be filled in by any presumption. The agreed term of years had not yet expired, so that the cases of "holding over" are clearly distinguishable and have no application. *The appellant's predecessor in title could not have pleaded a monthly tenancy*, whatever else he might argue to be the legal effect of the appellant's entering into possession by virtue of an invalid lease. The respondents, as purchasers, with notice of a tenant in possession, cannot have any better rights against the tenant than the original landlord.

The learned trial judge held, in my view quite rightly, that the respondents cannot be heard to say that they were not bound by any rights of the appellant under the agreement. Whether or not the respondents had been actually made aware of the terms of that agreement before their purchase of the premises, they were given a copy thereof before commencement of their action for possession. In that event they ought to have considered whether the notice they had given was valid for terminating a tenancy from year to year. If they chose to take the risk, in case the tenancy question should be answered against them, they have only themselves to blame. I have perused the terms of the notice and in my opinion it is not a valid notice for a tenancy from year to year. In any event the writ for possession was filed on May 9, 1966, only 9 days after expiry of a month's notice given to determine the tenancy on April 30, 1966.

For the reasons given above I respectfully differ from the learned trial judge and would allow the appeal with costs here and in the court below.

Suffian F.J.: I have had the advantage of studying the judgements in draft of my Lord Chief Justice and my brother Ali, and I am of the opinion that this appeal should be dismissed with costs for the reasons given by my brother Ali.

Ali F.J.: This is an appeal from the decision of Gill J. (as he then was) in an action for possession of premises No. 33A, Newcome Road, Malacca. The dispute between the parties turned on the validity of the monthly notice to quit issued by the landlord, the successful party in the action. The decision appealed from is in reality a decision in another case, Civil Suit No. 53 of 1966,* in which the same landlord sued another tenant, Tan Tin Kek trading as Nan Yang Ice Cafe for possession of premises No. 33, Newcome Road, Malacca after having issued a month's notice to quit. As the tenancy agreements in both cases are identical in terms, thereby giving rise to the same dispute, it was agreed by both parties in this appeal that the decision in the other case would be accepted as a decision in this case. In this appeal I shall refer to the appellant as the tenant and the respondents as the landlord.

The tenancy agreement under which the tenant took over the premises was in the Malay language and contained terms, translated into English language, as follows:—

"(1) The tenant shall pay a monthly rent of $100 (Dollars one hundred only) to the landlord commencing from the first day of September in the year one thousand nine hundred and fifty eight.

(2) The period of tenancy shall be for eighty years (80 years) only beginning from 1.9.1958 and ending on 31.8.2038.

(3) The landlord shall not increase the rent of the house if the assessment rate of the house has not been increased by the Malacca Municipal Council.

(4) The tenant is entitled to make use of the house rented to him for carrying on any type of business for eighty years.

(5) The tenant is entitled to sub-let the house rented to him to any other person provided there is no arrears of rent."

* [1968] 2 M.L.J. 126.

Inasmuch as the written instrument was intended to give a lease of 80 years and inasmuch as it was not made by deed and was not in English language as required by section 53 of the Conveyancing and Law of Property, Ordinance (S.S. Cap. 118), it was rightly held by the learned trial judge that it was void as a lease. Following the principle stated in *Doe d. Rigge v. Bell*[2] which is also discussed in *Woodfall* on Landlord and Tenant, Vol. 1 (26th Edition) at page 296,† the learned trial judge also held that on the tenant's entry upon such a void lease the same result flows as from an entry upon an agreement for a lease. On page 3 of *Woodfall* on Landlord and Tenant (*supra*) the effect of an entry on an agreement or contract for a lease is stated in these words‡:—

". . . . . A contract for a lease is not in itself a demise, but is merely an agreement that the intending lessor shall grant a lease and that the intending lessee shall accept the same. Such a contract does not of itself create a legal relationship of landlord and tenant, but it has long been established that so soon as the tenant enters under the agreement the relationship arises and he becomes a tenant at will, and that when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy. The same rule applies to entry under a void lease."

In the instant case, the learned trial judge after considering the authorities referred to in his judgment arrived at the conclusion that on the proper construction of the tenancy agreement before the court the tenancy was a monthly tenancy and that the notice to quit issued was therefore a good notice. The authorities in support of this conclusion, to mention only a few, are *Braythwayte v. Hitchcock*,[3] *Ladies' Hosiery and Underwear, Limited v. Parker*[4] and *Adler v. Blackman*.[1] In *Adler v. Blackman, supra*, Somervell L.J. after referring to the presumption of law stated in *Hill and Redman*, Landlord and Tenant, 11th Edition, at page 28, as to the existence of a yearly tenancy, said at page 149:—

"The first question is whether the fact that there is no yearly rent prevents the presumption applying or, rather, leads to the conclusion that it would not apply unless there might be some other circumstances on which it could be based."

Following the *dictum* of Maugham J. in *Ladies' Hosiery and Underwear, Limited v. Parker, supra*, the same judge answered the question at page 150 in these words:—

". . . . But in a case like the present, where the rent is expressed to be per week, I think when the fixed period has come to an end one should not presume anything but a weekly tenancy, namely, a tenancy for the period in respect of which the rent is expressed. It is one of those cases (and there are many) when the law has to do its best to fill up a gap which has been left by the parties. The parties are obviously in some relationship of landlord and the tenant but they have not taken the trouble to write down in black and white what the relationship is. That, I think, is the proper conclusion."

The dispute in *Adler's* case *supra*, turned on the term of the agreement between the parties expressed in this way:—

". . . . To hold for the term of one year to commence from December 22nd, 1947, at the inclusive weekly rent of £3 payable weekly in advance on Monday in each week during the whole of the tenancy . . . . . "

Jenkins L.J. in the same case, agreeing with Somervell L.J. said at page 151:—

". . . . I think all the cases in which an implication of a yearly tenancy taking effect after the termination of a letting for one year, or a term of years, has been held to have been raised have been cases where the original letting, from which the implication was deduced, was a letting for a year or for a term of years at an annual rent, that is to say, a rent expressed as an annual sum, ... "

Referring to the term of the agreement before him, Jenkins L.J. went on to say at page 151:—

". . . . the rent being thus expressed to be payable simply as a weekly rent and not as an instalment of the rent fixed for the one year's tenancy . . . . "

Something to the same effect is also stated in *Halsbury's* Laws of England, 3rd Edition, Volume 23 at page 512:—

"A tenancy from year to year is only created by presumption of law where the rent is yearly rent, though it may be payable quarterly or at any other interval constituting an aliquot part of a year. Thus, payment of £10 under an agreement reserving a yearly rent of £120 payable monthly will create a yearly tenancy, but payment of £10 under an agreement reserving a rent of £10 per month will only create a tenancy from month to month."

In contending that his client was holding a yearly tenancy, counsel for the tenant in Civil Suit No. 53 of 1966 referred to the decision in *Tress v. Savage*.[5] That was a case in which the landlord and the tenant executed a written instrument not under seal and under which the tenant was:—

"To hold the same . . . . . for the term of three years to be computed from the twenty fifth day of December instant, yielding and paying unto . . . . . , the annual rent of £48, to be paid monthly on the 25th day of each and every month in the year, the last payment whereof to be made on the 25th day of November 1853."

The agreement was executed on 17th December, 1850. Immediately on the expiry of the three year period, the landlord, on the 26th December, demanded possession. The defendant refused to quit contending that he was entitled to notice. The dispute turned mainly on the effect of the relevant provisions of the Statute of Frauds on the lease which was not made by deed. Referring to section 3 of the Statute then in force, Coleridge J. said at page 17:—

† 27th Edn., vol. 1 p. 281.

‡ *ibid*, p. 3.

". . . . . It seems to us that the intention of the Legislature is clear in both statutes. The intention was that leases should not be made except by deed.

. . . . . .

It seems to us, therefore, that the party entering into possession under such an instrument is in the same position as that in which he would have been before the Acts. He has not a lease, nor a tenancy for the three years and a week; but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties he goes out without notice."

The same result would have followed in the present case if the rent payable under the agreement had been an annual rent. In my judgment the decision in *Tress v. Savage, supra,* is not inconsistent with the decision in cases supporting the learned trial judge's conclusion.

Before us the appellant raised two grounds of appeal. First, that the learned trial judge has placed too much reliance on the manner of payment of rent in deciding whether a yearly tenancy had been created but has not considered other factors such as the conduct and intention of the parties concerned prior to the execution of the lease, the long period of the lease, the nature of business carried on within and in particular the fact that the parties were not represented by counsel in this preparation of the lease. Secondly, the appellant complained that the learned trial judge has not examined the relevant documents or given the appellant the opportunity to be heard so as to form an opinion as to the other considerations surrounding the said tenancy.

The answer to the first ground of appeal is that so far as the main question before the trial court was concerned with the validity or otherwise of the notice to quit it was clearly a question of law which fell to be decided in accordance with established legal principles acceptable to the courts in this country. The manner of payment of rent has always been the basis of consideration in the formulation of the principle stated in the English cases which, undoubtedly led the learned trial judge to come to the conclusion as he did in this case. If the trial court had any discretion in the matter, there might be ground for saying that the factors referred to by the appellant would be relevant for consideration. But this is not a case in which the court has to exercise a discretionary power but to construe the effect of the relevant term of the written agreement. The appellant's contention is not well founded and should be rejected.

The second ground of appeal can be disposed of in a few words. Apart from the tenancy agreement which was considered by the learned trial judge I cannot find any other which could be said to be relevant to support the appellant's legal contention that he was holding a yearly tenancy. As to the complaint that she was not given an opportunity to be heard, I shall be content to say that the appellant is bound by the agreement of her counsel to abide by the decision in Civil Suit No. 53 of 1966.

In my opinion this appeal should be dismissed with costs here and below.

Appeal dismissed.

Solicitors: *M. Abraham & Co.; Lovelace & Hastings.*

LOH KHENG MEAH & ORS. v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) July 28, 1969]

[Kuala Lumpur—Federal Court Criminal Appeal No. X.12 of 1969]

Criminal Law and Procedure — Trial — Trial before judge with aid of assessors — Failure to record reasons given by assessors for their opinions — Not mere irregularity — Failure of justice — Kidnapping Act, 1961, s. 3(1) — Criminal Procedure Code (Cap. 21), ss. 197, 198 & 422.

This was an appeal against conviction for an offence contrary to section 3(1) of the Kidnapping Act, 1961. The accused were tried by a judge with the aid of assessors. At the end of the summing up the learned trial judge asked each assessor for his opinion on a number of questions and each of the assessors gave his answers to these questions. The learned trial judge agreed with their opinions and accordingly convicted the 1st and 3rd appellants and sentenced them to death. On appeal it was argued, *inter alia,* that the learned trial judge should have ascertained from each assessor the reasons for his opinion, that these reasons should be recorded and that the admitted failure of the learned trial judge to do so vitiated the trial.

Held: the reasons given by the assessors might have influenced the learned judge's judgment and the omission by the learned judge to ascertain the reasons for the opinion of the assessors had occasioned a failure of justice within the meaning of section 422 of the Criminal Procedure Code.

Cases referred to:—

(1) *Ramanugrah Singh* v. *King-Emperor* 73 I.A. 174.

(2) *Abdul Rahman* v. *King-Emperor* 54 I.A. 96.

(3) *Subramania Iyer* v. *King-Emperor* 28 I.A. 257.

(4) *Lal Behari Singh & Ors.* v. *Emperor* A.I.R. 1934 Oudh 354.

(5) *Prem Nath* v. *State of Delhi* A.I.R. 1956 S.C. 4.

FEDERAL COURT.

Dato' S.P. Seenivasagam (*R. Rajasingham* with him) for the 1st appellant.

Tan Phock Kin for the 3rd appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Azmi L.P.: The first and third appellants were charged with abducting Lim Pee Hong